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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. _____

IGNACIO ALBERTO ORTIZ,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

1. Does not Arizona's death penalty law, as applied, deny due process of law and constitute cruel and unusual punishment?

2. Did not the procedure under which the sentencing court imposed the death penalty constitute cruel and unusual punishment and deny petitioner his rights to due process of law and to confront and cross-examine his accusers?

3. When the sentencing court determines that mitigating circumstances do not outweigh three aggravating circumstances and imposes the death penalty, but, on appeal, one aggravating circumstance is held to be invalid and a portion of a second aggravating circumstance is likewise found to be invalid, does not due process of law require that the case be remanded to the sentencing court for reconsideration of the death penalty in light of only validly applied aggravating circumstances?

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CITATION OF OPINION BELOW

State v. Ignacio Alberto Ortiz, No. 4818 (Az. S.Ct., filed November 23, 1981). Motion for Rehearing denied January 12, 1982. Copies of the Opinion and the denial of the Motion for Rehearing are contained in the appendix.

STATEMENT OF JURISDICTION

On November 23, 1981, the Supreme Court of Arizona affirmed Petitioner's conviction and death sentence for first degree murder. Petitioner's convictions and sentences for three counts of attempted first degree murder, two counts of aggravated assault, one count of arson of an occupied structure, one count of first degree burglary and one count of conspiracy to commit first degree murder were also affirmed.

On January 12, 1982, the Supreme Court of Arizona denied Petitioner's Motion for Rehearing.

The mandate of the Supreme Court of Arizona issued on January 13, 1982.

This Court has jurisdiction to review the opinion of the Supreme Court of Arizona, pursuant to 28 U.S.C. §1257(3).

TABLE OF AUTHORITIES INVOLVED

(Set forth in appendix, supra.)

Sixth Amendment to the United States Constitution

Eighth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Ariz.Rev.Stat.Ann. §13-703

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STATEMENT OF THE CASE

On December 21, 1978, Manuelia McCormick died as a result of multiple stab wounds. Petitioner was indicted by the Pima County Grand Jury and charged with first degree murder in connection with her death. On December 21, 1978, the two daughters of Manuelita McCormick were stabbed, however, they recovered from their wounds. Petitioner was indicted and charged with two counts of aggravated assault in connection with those injuries. On December 21, 1978, the residence in which Manuelia McCormick and her family were residing was set on fire. Petitioner was indicted and charged with one count of arson and three counts of attempted first degree murder in connection with the fire. The three counts of attempted first degree murder arose because three children of Manuelita McCormick were in the residence at the time of the fire.

While awaiting trial, Petitioner was incarcerated at the Pima County Jail. Approximately three weeks after being held in jail, Petitioner and a convicted felon named Joe Alvarez became cellmates. After being Petitioner's cellmate for several weeks, Alvarez notified representatives of the Pima County Attorney's Office that Petitioner had solicited his assistance in a plan to kill the witnesses in Petitioner's murder case. On March 26, 1979, Petitioner and his wife were indicted and charged with conspiracy to commit first degree murder; it was alleged that Petitioner had conspired with his wife and Mr. Alvarez to kill six people in connection with his pending murder case. At his trial, petitioner testified that he had not conspired with anyone to kill the witnesses and that he had only talked with Mr. Alvarez about his pending murder case because he was afraid of Mr. Alvarez. R.T. 6/26/79

at 153, 158, 163, 196.

The charges arising out of the incident of December 21, 1978 and the conspiracy charge were joined for trial. Petitioner was convicted of all counts. After Petitioner was found guilty, the trial of Petitioner's wife commenced before the judge who conducted Petitioner's trial. Petitioner's wife testified during her trial. At the close of the evidence, Respondent moved to dismiss the charges against Petitioner's wife with prejudice. R.T. 7/6/79 at 247-48. The trial court granted the motion.

Prior to Petitioner's sentencing, he filed a Motion for a Bill of Particulars, requesting that the Respondent be required to specify which aggravating circumstances it would allege in support of its request for the death penalty and the facts alleged in support thereof. The trial court granted the Motion in part; however, the trial court did not require that the Respondent specify which acts it alleged supported the various aggravating circumstances.

Pursuant to Ariz. Rev. Stat. Ann. §13-703, the trial court conducted an aggravation-mitigation hearing. Respondent relied upon three aggravating circumstances:

1.) Pursuant to Ariz.Rev.Stat.Ann. §13-703(F)(1) that Petitioner had been convicted of another offense for which a sentence of life imprisonment or death was imposable, to-wit: the conviction for conspiracy to commit first degree murder;

2.) Pursuant to Ariz.Rev.Stat. Ann. §13-703(F)(3), that in the commission of the offense, Petitioner knowingly created a grave risk of death to another person or persons, in addition to the victim of the offense;

3.) Pursuant to Ariz.Rev.Stat. Ann. §13-703(F)(6), that the Petitioner committed the offense in an especially heinous,

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cruel or depraved manner.

At the aggravation-mitigation hearing, Petitioner argued the following mitigating circumstances:

1.) That Petitioner had no prior substantial criminal record;

2.) That Petitioner was a responsible member of the community with substantial employment and that he had served as a responsible officer in a local labor union;

3.) That Petitioner was a good father to his children;

4.) That Petitioner was under unusual and substantial duress;

5.) That Petitioner's ability to understand the wrongfulness of his conduct had been impaired because of his repressed emotional and psychological development;

6.) That the Petitioner had above-average intelligence;

7.) That according to the testimony of a psychiatrist, Petitioner would probably not be a repeat offender.

R.T. 10/4/5/79 at 141-49. Over the repeated objections of Petitioner, R.T. 10/4/5/79 at 26-28, 31-34, 79, 80-81, the trial court considered the testimony of Petitioner's wife during her conspiracy trial, as rebuttal evidence to the mitigating circumstances presented.

In accordance with Ariz.Rev.Stat.Ann. §13-703(D), the trial court returned a special verdict setting forth its findings as to the existence or non-existence of each aggravating and mitigating circumstance. (A copy of the special verdict of the trial court is reproduced in the appendix.) The trial court found that each of the three aggravating circumstances alleged by the Respondent existed. R.T. 10/15/79 at 4-7. It is unclear whether the trial court found that there were no mitigating circumstances or whether it found that the mitigating

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circumstances were not sufficiently substantial to call for leniency. The trial court found that Petitioner was jealous and angry, but determined that this did not constitute duress. R.T. 10/15/79 at 7. The trial court found that Petitioner's lack of a prior criminal record, his intelligence, his responsible position in the community and his performance as a good father would ordinarily be mitigating circumstances. R.T. 10/15/79 at 9-10. However, the trial court ruled that these circumstances were not mitigating because of:

> "... the facts that the court learned principally from the trial and the testimony of the defendant's wife at her trial, that evidence disclosed, and the Court finds that the defendant was an adulteror, a violent wife-beater, and a liar."

R.T. 10/15/79 at 11-12.

The trial court, therefore, sentenced Petitioner to death. R.T. 10/15/79 at 31-32. On appeal to the Arizona Supreme Court, Petitioner argued that the Arizona death penalty statute was unconstitutional because it violated the Eighth and Fourteenth Amendments to the United States Constituion. The Arizona Supreme Court upheld the constitutionality of the Arizona death penalty law.

Petitioner also challenged the legality and the constitutionality of the imposition of the death penalty in his case. The Arizona Supreme Court held that imposition of the death penalty in the Petitioner's case was constitutional. However, in reviewing the aggravating and mitigating circumstances, the Arizona Supreme Court held that the trial court erred when it determined that the killing of Manuelita McCormick was especially cruel; the Arizona Supreme Court upheld the finding of the trial court that the killing of Manuelita McCormick was especially heinous or depraved. The Arizona Supreme Court also ruled that

the trial court erred when it determined that Petitioner had been convicted of another offense for which a sentence of life imprisonment or death was imposable. Although finding these errors in the sentencing of the Petitioner, the Arizona Supreme Court did not remand Petitioner's case to the trial court for a re-evaluation of the aggravating and mitigating circumstances and a redetermination whether the mitigating circumstances were sufficiently substantial to call for leniency. Instead, the Arizona Supreme Court, in its own independent review of the record, ruled that the mitigating circumstances were not sufficiently substantial to call for leniency. Therefore, it affirmed the imposition of the death penalty.

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RAISING THE FEDERAL QUESTION

CONSTITUTIONALITY OF ARIZONA DEATH PENALTY LAW

On appeal, Petitioner challenged the constitutionality of the Arizona death penalty law, arguing that its application constituted cruel and unusual punishment and denied criminal defendants due process of law. See, Opening Brief at 50-56; Reply Brief at 39-48. The opinion of the Arizona Supreme Court upheld the constitutionality of the death penalty statute, as applied.

CONSTITUTIONALITY OF THE DEATH PENALTY IN THIS CASE

Petitioner has challenged the constitutionality of the death penalty in this case on three grounds. First, in a Motion for Bill of Particulars, filed with the trial court on September 5, 1979, Petitioner requested that the aggravating circumstances relied upon by Respondent be specified prior to the aggravation-mitigation hearing and that Petitioner be given notice of the facts which were to be alleged in support of those circumstances.

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This Motion was based upon the due process clause of the Fourteenth Amendment. The trial court granted the first part of the Motion, but refused to require Respondent to set forth the alleged factual underpinning of the aggravating circumstances. This issue was also raised in Petitioner's appellate briefs. See, Opening Brief at 38-40; Reply Brief at 24-25. The Arizona Supreme Court acknowledged that the due process clause of the Fourteenth Amendment required notice of the aggravating circumstances, but held that the notice which was given was sufficient.

The second constitutional defect in the imposition of the death penalty in this case arose during the aggravation-mitigation hearing. Allegedly to rebut evidence of mitigating circumstances, Respondent was allowed to introduce the testimony of Petitioner's wife during her trial. Petitioner objected to this evidence on the grounds that it deprived him of his right to confront and cross-examine witnesses against him. R.T. 10/4/5/79 at 26, 31-34, 78, 80-81. This denial of Petitioner's Sixth Amendment right was also raised in his appellate briefs. Opening Brief at 40-42; Reply Brief at 25-26. The Arizona Supreme Court held that there was no violation of Petitioner's constitutional rights.

The third constitutional defect arose out of the trial court's consideration of the aggravating and mitigating circumstances in this case. This issue was raised in two memoranda filed by Petitioner prior to the aggravation-mitigation hearing. See, Defendant's Memorandum on Aggravating Circumstances, filed October 3, 1979; Defendant's Supplemental Memorandum on Aggravating Circumstances, filed October 5, 1979. This issue was also raised in Petitioner's appellate briefs. See, Opening Brief at 43-50; Reply Brief at 29-38.

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REMAND TO TRIAL COURT FOR PROPER RECONSIDERATION OF DEATH PENALTY

In its opinion, the Arizona Supreme Court held that the trial court erroneously found one aggravating circumstance and partially reversed the finding of another aggravating circumstance. Nevertheless, the Arizona Supreme Court affirmed the imposition of the death penalty. In his Motion for Rehearing, Petitioner argued that the Arizona Supreme Court should remand the case to the trial court for reconsideration of the death penalty using only proper aggravating circumstances. Motion for Rehearing at 26-28. The Arizona Supreme Court denied the Motion for Rehearing.

ARGUMENT

THE ARIZONA DEATH PENALTY LAW DENIES DUE PROCESS OF LAW AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

The imposition of the death penalty in Arizona is governed by Ariz.Rev.Stat.Ann. §13-703. That law mandates the holding of an aggravation-mitigation hearing before the trial judge. At the hearing, the Respondent has the burden of proving beyond a reasonable doubt the existence of at least one of seven aggravating circumstances. Only evidence which is admissible at a trial is admissible to prove aggravating circumstances. Respondent may rely on any evidence presented during the trial relating to either aggravating or mitigating circumstances without reintroducing it at the aggravation-mitigation hearing. Failure to prove any aggravating circumstances precludes imposition of the death penalty.

The accused has the burden of proving mitigating circumstances. Evidence which is used to prove mitigating circumstances need not be admissible at trial. After all the evidence

is presented, the trial judge must determine whether the mitigating circumstances are sufficiently substantial to call for leniency. The trial judge must make those findings in a special verdict.

This statutory scheme constitutes cruel and unusual punishment and denies due process in three ways. First, the aggravating circumstance embodied in Ariz. Rev. Stat. Anno. §13-703(F)(6) is overbroad and vague. That circumstance covers murders which are committed in an especially cruel, heinous or depraved manner. In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court considered the issue whether the Georgia Supreme Court had adopted such a broad and vague construction of one aggravating circumstance so as to violate the 8th and 14th Amendments to the United States Constitution. This Court held that the Georgia Supreme Court had adopted such an unconstitutional construction. Ariz. Rev. Stat. Anno. §13-703(F)(6) suffers from the same malady. The genesis of this aggravating circumstance illustrates the overbreadth and vagueness inherent in its interpretation. The overbreadth and vagueness is reflected in its inconsistent application in trial courts.

The Arizona Supreme Court has adopted three different interpretations of this aggravating circumstance. Initially, the Arizona Supreme Court appeared to limit it to cases in which the victim was tortured or suffered extreme pain. See, e.g. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). This is the standard applied in Florida and virtually every other jurisdiction with a similar aggravating circumstance. See, e.g. Ex Parte Kyzer, 399 So.2d 330 (Ala. 1981); State v. Dixon, 283 So.2d 1 (Fla. 1973); State v. Culbreth, 390 So.2d 847 (La. 1980); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977).

Subsequently, however, the Arizona Supreme Court adopted a

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more expansive interpretation to cover cases in which there was no torture to the victim. In those cases, a killing was held to be especially cruel, heinous or depraved if the defendant's conduct went beyond the point necessary to fulfill his or her criminal plan. See, e.g., State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977).

The third interpretation given to this aggravating circumstance by the Arizona Supreme Court appears to encompass not only those cases which meet either of the previous two interpretations, but also virtually every other first degree murder. Under this interpretation, the killing is especially cruel if it inflicts pain upon the victim; the killing is especially heinous if it is hatefully or shockingly evil; a killing is depraved if it is marked by debasement. See, e.g. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977). This interpretation is what the Arizona Supreme Court used in Petitioner's case.

The interpretation given by the Arizona Supreme Court fails to require a showing of torture or pitiless infliction of unnecessary pain on the victim. Courts which have considered such an aggravating circumstance have required that type of limitation. In State v. Culbreth, supra, the Louisiana Supreme Court noted:

> " We have stated that the concept of heinousness must necessarily include 'some idea of torture or the pitiless infliction of unnecessary pain on the victim.' State v. English, supra, at 823. Such a construction is necessary to protect the statute from attack on grounds of vagueness and overbreadth and to provide adequate guidelines for those involved in the sentencing process. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)." 390 So.2d at 851.

Likewise, at least one member of this Court has declared that

a disjunctive interpretation of an aggravating circumstance similar to Section 13-703(F)(6) "would arguably be assailable on constitutional grounds." Godfrey v. Georgia, 446 U.S. 420, 454 (White, J. dissenting, 1980). By adopting a disjunctive interpretation of Section 13-703(F)(6) without requiring a showing of torture or the pitiless infliction of unnecessary pain on the victim, the Arizona Supreme Court has adopted an interpretation which is unlike the interpretation in any other jurisdiction, which is unconstitutionally overbroad, which is unconstitutionally vague and which fails to provide guidance in the exercise of a trial court's discretion.

The lack of guidance is best illustrated by comparing the decisions of trial courts in two death penalty cases. In State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980) and State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980), the trial of co-defendants in a first degree murder prosecution were severed. Each trial was conducted before a different judge. In State v. Steelman, the trial judge found that the murder was committed in an especially heinous manner. That finding was upheld by the Arizona Supreme Court. In State v. Gretzler, the trial court determined that the murder was not especially cruel, heinous or depraved. If this aggravating circumstance were more narrowly defined, and more precisely defined, then such dichotomies would not arise. The fact that this gross inconsistency did appear graphically illustrates the fundamental potential for the arbitrary imposition of the death penalty in Arizona in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

A similar vagueness exists when the trial court is required to determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." No opinion of the Arizona

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Supreme Court has attempted to define when mitigating circumstances are sufficiently substantial to call for leniency. As a result, trial courts have reached conflicting conclusions when they attempt to weigh the aggravating and mitigating circumstances. For example, in State v. Rodriguez, 126 Ariz. 28, 612 P.2d 484 (1980), the defendant was re-sentenced to life imprisonment after the trial court was instructed to consider the age of the defendant as a mitigating circumstance. In contrast, in State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979), the age of the defendant was not a sufficiently substantial mitigating circumstance to call for leniency. Likewise, in State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), the Arizona Supreme Court affirmed the imposition of the death penalty in a case where there was one aggravating circumstance and one mitigating circumstance. Yet, in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), the Arizona Supreme Court set aside the imposition of the death penalty in a case where, as in Knapp, there was one aggravating circumstance and one mitigating circumstance.

The impact of the decison of this Court in Furman v. Georgia, 408 U.S. 238 (1972), was that a state must adopt guidelines to avoid the arbitrary infliction of the death penalty. The Arizona death penalty scheme fails to satisfy that requirement.

In Furman v. Georgia, and Gregg v. Georgia, 428 U.S. 153 (1976), this Court emphasized the importance of effective appellate review of the death penalty. For the death penalty to be constitutional, a State should provide appellate review which insures consistency and proportionality in the imposition of the death penalty. See generally, Dix, "Appellate Review of the Decision to Impose Death," 68 Geo.L.J. 97, 106-109 (1979). The review undertaken by the Arizona Supreme Court in connection

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with death penalty cases fails to satisfy the requirement for proportionality review. Proportionality review envisions a comparison between the case under review and cases which have previously been decided. The Arizona Supreme Court has never, at least explicitly, performed that type of review. The failure to give potentially mitigating factors the same significance also violates the requirement of proportionality. See, Dix, supra, at 107. The Arizona Supreme Court has never previously dictated that potentially mitigating factors be given the same significance. Appellate review in death penalty cases should also provide the basis for proper and consistent sentencing practices, including indicating what weight should be given to aggravating and mitigating circumstances. See, Dix, supra, at 109. The Arizona Supreme Court has failed to give that guidance as well.

For these reasons, the death penalty in Arizona is an unconstitutionally cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and further constitutes a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

IMPOSITION OF THE DEATH PENALTY IN THIS CASE DENIES DUE PROCESS OF LAW AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The imposition of the death penalty in this case offends fundamental concepts of due process and constitutes cruel and unusual punishment in three respects: 1) Petitioner was denied adequate notice of the aggravating circumstances relied upon by the Respondent; 2) Petitioner was denied his right to confront and cross-examine witnesses against him when testimony of his wife at her trial was introduced into evidence purportedly to rebut the evidence he presented of mitigating circumstances;

3) the trial court and the Arizona Supreme Court improperly applied and weighed the aggravating and mitigating circumstances so as to deny Petitioner due process of law and his protection against cruel and unusual punishment.

In its opinion in this case, the Arizona Supreme Court recognized for the first time that a defendant in a capital case must be given notice of the aggravating circumstances relied upon by Respondent. However, the Arizona Supreme Court ruled that the notice given in this case was constitutionally sufficient. In making that ruling, the Arizona Supreme Court ignored the minimal due process requirements enunciated by this Court in In Re Gault, 387 U.S. 1 (1967). In Gault, this Court declared that "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" 387 U.S. at 33 [Footnote omitted]. The Arizona Supreme Court ignored the requirement of particularity.

The Arizona Supreme Court relied upon the statutory provision which mandates that evidence admitted at trial be considered at the aggravation-mitigation hearing without reintroducing it. Yet that can hardly qualify as setting forth "the alleged misconduct with particularity."

The reasoning of the Arizona Supreme Court in this case is analogous to its analysis in Gault. In Gault, the Arizona Supreme Court had decided that the juvenile's mother "knew the exact nature of the charge against Gerald from the day he was taken to the detention home." The Arizona Supreme Court based that assumption on the fact that the juvenile's mother had been oralled informed of the reason he was in custody. That type of notice is analogous to being present during a trial and trying

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to determine which facts will be considered by the trial judge as evidence in support of aggravating circumstances. Just as the notice in Gault was constitutionally defective, so the notice in Petitioner's case was likewise defective.

The admission of the testimony of Petitioner's wife during her trial to rebut evidence Petitioner had introduced to prove mitigating circumstances deprived Petitioner of one of the most fundamental due process rights, the right to confront and cross-examine witnesses against him. In Williams v. New York, 337 U.S. 241 (1949), this Court held that a defendant in a capital case did not have this Sixth Amendment right. That decision, however, does not compel the same holding in this case for at least two reasons. First, as this Court recognized in Gardner v. Florida, 430 U.S. 349 (1977), when Williams was decided, no significant constitutional difference was recognized between the death penalty and lesser punishments; since that time, this Court has recognized such a difference. As this Court declared in Gardner, "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358.

Second, the sentencing procedure in a death penalty case in Arizona is, in essence, a trial. This procedure contrasts greatly with the procedure in Williams. Because of the trial-like nature of the sentencing hearing, certain rights exist which might not otherwise. See, Bullington v. Missouri, ___ U.S. ___, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

Indeed, the sentencing procedure compares quite closely with the procedure which existed in Specht v. Patterson, 386 U.S. 605 (1967). For example, as in Specht, the sentencing judge in a death penalty case must make a new finding of fact which was not an ingredient of the first degree murder charge.

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In Specht, this Court held that due process required that the defendant be present with counsel, have an opportunity to be heard, to offer evidence of his own and "be confronted with witnesses against him, [and] have the right to cross-examine...." 386 U.S. at 610. Petitioner was denied the right to be confronted with witnesses against him and the right to cross-examine.

In United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977), the Fifth Circuit evaluated the constitutionality of the federal recidivist statute. That statute, like Arizona's death penalty law, required a separate hearing with separate findings of fact. In its analysis, the Fifth Circuit reviewed the opinions in Specht and Williams. It concluded that defendants accused under the recidivist statute were entitled to minimal due process rights and that those rights included the right to cross-examine witnesses. Certainly because of the unique nature of the death penalty, Petitioner should have been accorded at least the same right.

The third way in which the imposition of the death penalty in this case denied due process and constituted cruel and unusual punishment arises out of the analysis of the aggravating and mitigating circumstances by the trial court and the Arizona Supreme Court. The trial court ruled that numerous mitigating circumstances were outweighed because Petitioner "was an adulterer, a violent wife beater, and a liar." R.T. 10/15/79 at 12. That finding was nothing but an unconstitutional enlargement on the statutory aggravating circumstances. None of the aggravating circumstances established by Arizona law consider whether a person is an adulterer, a wife beater or a liar. For the trial judge to have made such findings and for the Arizona Supreme Court to have upheld such findings, only one of two conclusions can be drawn. Either a sentencing judge

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can include more than the statutory aggravating circumstances in determining whether to impose the death penalty; or the trial judge improperly considered non-statutory aggravating circumstances. In either event, the imposition of the death penalty would be unconstitutional. If the first conclusion were correct, then Arizona's death penalty law would suffer from the same defect which produced the decision of this Court in Furman v. Georgia, 408 U.S. 238 (1972). If the second conclusion were correct, then the Petitioner's death sentence was imposed contrary to law

Furthermore, in its review of the aggravating circumstances in this case, the Arizona Supreme Court deviated from established precedents, just as the Georgia Supreme Court did in Godfrey v. Georgia, 446 U.S. 420 (1980). For example, in its previous decisions interpreting Ariz. Rev. Stat. Anno. §13-703(F)(3), whether in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense, the Arizona Supreme Court had limited its analysis to the act of killing the victim. As a result, the Arizona Supreme Court had reversed the finding of this aggravating circumstance in two cases in which the defendants had killed more than one person, because in the act of killing the first victim the defendants had not created a grave risk of death to the other people who were subsequently killed. See, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980); State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977). Nonetheless, in deciding Petitioner's case, the Arizona Supreme Court explicitly considered events far beyond the act of killing Manuelita McCormack.

A similar deviation occurred when the Arizona Supreme Court evaluated whether the killing was especially heinous or

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depraved. The Arizona Supreme Court expressly relied upon events other than the killing of Manuelita McCormack in finding that the killing was especially heinous and depraved. The trial court did so as well. Yet, in State v. Johnson, No. 5239 (Az. S.Ct., filed Jan. 18, 1982), the Arizona Supreme Court held that it was error to consider events other than those encompassed in the offense which was committed in deciding whether an offense was committed in an especially cruel, heinous or depraved manner. In Johnson, the defendant pleaded guilty to solicitation to commit murder. In sentencing the defendant, the lower court considered the way in which the murder was to be committed. The Arizona Supreme Court held that this was erroneous, declaring, "The sentencing court must therefore focus on the offense that was actually committed. Appellant was convicted of solicitation, not murder. It was therefore error for the sentencing court to find this aggravating circumstance by considering the manner in which defendant intended, desired or acquiesced that the offense be carried out." Slip Opinion at 8.

BECAUSE THE ARIZONA SUPREME COURT REVERSED PART OF THE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT, DUE PROCESS REQUIRES THAT THE CASE BE REMANDED TO THE SENTENCING COURT FOR RECONSIDERATION OF THE DEATH PENALTY IN LIGHT OF ONLY VALIDLY APPLIED AGGRAVATING CIRCUMSTANCES.

The Arizona Supreme Court reversed the finding of the trial court that Petitioner had previously been convicted of an offense for which a sentence of life imprisonment or death was imposable. It also reversed the finding of the trial court that the killing was especially cruel, although it affirmed the finding that the killing was especially heinous and depraved. Nevertheless, the Arizona Supreme Court did not remand the case to the sentencing court for reconsideration of the death penalty

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in light of only validly applied aggravating circumstances. Because of the unique role of an appellate court in a death penalty case, due process requires such a remand.

Courts which have reviewed this issue have concluded that the appellate court remand the case to the sentencing court. In Stephen v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted No. 81-89, one of three aggravating circumstances found by the sentencing court was later held to be unconstitutional. The Fifth Circuit held that the death penalty was invalid, and that the case had to be remanded. In Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), the Wyoming Supreme Court concluded that where the aggravating circumstances included one improper circumstance, "we must return the case to the trial court for a new sentencing trial." 632 P.2d at 171-72. Accord, Bufford v. State, 382 So.2d 1162 (Ala.Cr.App. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977); State v. Moore, 614 S.W.2d 348 (Tenn. 1981).

The reasons why a remand to the sentencing court is required are the same reasons why appellate courts are loathe to evaluate the sufficiency of evidence to sustain a conviction. The sentencing court has seen the witnesses; it has heard their testimony; it has seen the demeanor of the accused. To insure the integrity of the sentencing process in a death penalty case when an appellate court reverses any aggravating circumstance, it should remand the case to the sentencing court so that imposition of the death penalty can be reconsidered in light of only validly applied aggravating circumstances. Thereafter, if the death penalty is reimposed, then the appellate court can perform its function as dictated by the opinions of this Court.

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CONCLUSION

Arizona has adopted a death penalty law which, as it is applied, fails to provide proper standards and guidance to trial courts. At least one aggravating circumstance has been interpreted in an overbroad and vague manner. There are no standards to assist trial courts in determining whether mitigating circumstances are sufficiently substantial to call for leniency. Appellate review of death sentences fails to meet the standards established by opinions of this Court.

Petitioner was sentenced to death in derogation of his due process rights to adequate notice and to confront and cross-examine his accusers. In addition, in applying Arizona law to Petitioner's case, both the trial court and the Arizona Supreme Court deviated from established precedents.

Because the Arizona Supreme Court reversed certain aggravating circumstances found by the trial court and because of the unique role of an appellate court in a death penalty case, the Arizona Supreme Court should have remanded Petitioner's case to the trial court for reconsideration of the death penalty in light of only validly applied aggravating circumstances.

For these reasons, Petitioner prays that the Court grant his Petition and reverse his sentence.

RESPECTFULLY SUBMITTED this 31st day of March, 1982.

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